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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

INTERVINE OUTDOOR ADVERTISING, INC.,

Petitioner,

vs.

CITY OF GLOUCESTER CITY ZONING BOARD OF ADJUSTMENT & CITY OF GLOUCESTER CITY,

Respondents.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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33 pp

QUESTIONS PRESENTED FOR REVIEW

1) Whether a recent Gloucester City, New Jersey, billboard speech ban conflicts with this Court's decision in *Metromedia v. San Diego*, 453 U.S. 490, (1981) and its progeny, thereby permitting broad, municipal-level censorship of commercial and non-commercial sign speech.

2) Whether the New Jersey Supreme Court committed reversible error in concluding that a simple severance of the time restrictions from Section 1604.12 of the Gloucester City, New Jersey, Zoning Ordinance, ruled by that Court to be unconstitutional, renders the remaining portion of the Ordinance's ban on outdoor sign speech constitutional, when the sign Ordinance is still impermissibly content-specific and fails to satisfy the strict scrutiny test.

3) In the alternative, if the said Opinion of the New Jersey Supreme Court is interpreted to require severance and deletion of Ordinance Section 1604.12 in its entirety from the Gloucester City Zoning Ordinance, whether the New Jersey Supreme Court committed reversible error by permitting Gloucester City to completely prohibit all off-site non-commercial outdoor sign speech.

CITATIONS OF THE CASE BELOW

The Judgment of the New Jersey Supreme Court is found at page A1 of the Appendix; there was no formal written Opinion because the Court relied upon the written Opinion of the Superior Court of New Jersey, Appellate Division, found beginning at page A2 of the Appendix.

JURISDICTIONAL STATEMENT

Jurisdiction of this Honorable Court is conferred by 28 U.S.C. § 1257. The date of the Order sought to be reviewed is July 10, 1996 and the date same was filed is July 11, 1996.

STATUTORY PROVISIONS INVOLVED

City of Gloucester City, New Jersey Zoning Ordinance Article 1601 et seq. is found at Page A11 of the Appendix.

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No.

IN THE

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INTERVINE OUTDOOR ADVERTISING, INC.,

Petitioner,

vs.

CITY OF GLOUCESTER CITY ZONING BOARD OF ADJUSTMENT & CITY OF GLOUCESTER CITY,

Respondents.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

STATEMENT OF THE CASE

The parties to this proceeding are fully identified in the caption of the case in this Court. Petitioner, Intervine Outdoor Advertising, Inc. ("Intervine") of Cherry Hill, New Jersey, entered into an agreement with Holt Cargo Systems ("Holt") to lease certain premises located immediately adjacent to the Walt Whitman Bridge, an interstate highway over the Delaware River connecting Philadelphia with South Jersey, in order to construct three, free-standing, double faced, 960 square feet outdoor pole signs to display both commercial and non-commercial messages directly and only to Bridge traffic. Gloucester City has totally banned the billboards here and elsewhere throughout the City. The signs' proposed location is exclusively within the City's Industrial/Port & Cargo Zones, having no residences, but replete with huge

container-cargo ships, cranes, Holt's marine terminal complex and warehouses and the interstate highway system of the Walt Whitman Bridge. The pole signs stand approximately 160 feet tall and are designed to be visible only to passing Bridge traffic, and not visible to persons in Gloucester City. There are currently signs on the Philadelphia side of the Bridge.

Intervine formally applied for size, lighting, etc. variances under N.J.S.A. 40:55D-70 from the Gloucester City Zoning Board of Adjustment Sign Ordinance (See Page A-11 of Appendix). The Zoning Board rejected Intervine's Application and Intervine filed a Complaint in Lieu of Prerogative Writ; the Law Division issued a final written Order dismissing Intervine's Complaint. Intervine filed a Notice of Appeal with the Appellate Division of the Superior Court of New Jersey; the Appellate Division held that portions of the Ordinance's speech ban were indeed unconstitutional but ruled that severance of the offending portions cured the constitutional defect (See Page A-2 of Appendix). A Notice of Appeal with a Petition for Certification was filed in the New Jersey Supreme Court, which denied Intervine's Petition for Certification and dismissed its Appeal on July 11, 1996 in reliance upon the Appellate Division's Opinion (See Page A-1 of Appendix).

In its original Complaint in Lieu of Prerogative Writ, in each Brief before each Court below, and during all oral arguments, Intervine preserved for appeal before this Court its constitutional arguments: Intervine posited that the instant Gloucester City Zoning Ordinance is fatally flawed because the City's almost complete ban upon all off-premises sign advertising speech is unconstitutional pursuant to the U.S. Constitution, First Amendment and the N.J. Constitution, Article I, paragraph 6. Each Court below considered these constitutional issues beginning at the Trial Court level and found at the Superior Court, Appellate Division's Opinion at page A-2 of the attached Appendix; and at the New Jersey Supreme Court's Judgment found at page A-1 of the attached Appendix.

The Appellate Division and the Supreme Court both upheld Intervine's position that the determination of the constitutionality of the instant Zoning Ordinance vis-a-vis non-commercial usage was indeed ripe, contrary to the Respondents' arguments and the determination of the Trial Court. The two Courts also supported Intervine's position that the proposed signs clearly display non-commercial speech including the New Jersey State Tax Amnesty Program, Blood Drives, Political Campaigns, New Jersey State Aquarium and multiple social, political and charitable causes.

Moreover, the two Lower Courts upheld Intervine's position that the instant Zoning Ordinance as it relates to non-commercial speech is indeed unconstitutional: both Courts ruled that the Ordinance Section 1604.12 *time limitation* upon non-commercial speech, not found on City commercial speech regulations, was unnecessary and constituted an unconstitutional infringement upon protected non-commercial speech. However, the New Jersey Supreme Court committed reversible error by ruling that a simple severance of the offending time restrictions from the Zoning Ordinance would render the remaining parts constitutional as they relate to non-commercial speech.

Lastly, the Appellate Division and the New Jersey Supreme Court in reliance thereupon, upheld Intervine's position that Section 1604.12 of the Zoning Ordinance was content-specific and therefore subject to the Court's most exacting scrutiny. But the lower Courts improperly concluded that the instant Zoning Ordinance was the least restrictive means available to advance a compelling governmental interest since there is no evidence that traffic, aesthetics or safety are genuinely disadvantaged or that less restrictive alternatives were considered. The Court conducted a "*Bell*" hearing pursuant to *Bell v. Twp. of Stafford*, 541 A. 2d 692 (N.J. Sup. Ct. 1988) in which Gloucester City offered testimony as to the rationale behind its Ordinance which, subject to very limited exceptions, effectively prohibits all off-site outdoor sign speech inside the City. Testimony elicited established the City considered *no* other alternatives to the present broad ban. The

New Jersey Supreme Court ruled in *Bell* that such a ban was unconstitutional. Because the City did *not* evaluate any other less restrictive means to reach its goals this case is essentially identical to the outdoor sign ban held unconstitutional in *Metromedia v. San Diego*, 453 U.S. 490 (1981).

ARGUMENT FOR ALLOWANCE OF THE WRIT OF CERTIORARI

Where a municipality in the State of New Jersey effectively bans a regulated, taxed, and lawful industry, which displays both commercial and non-commercial speech via outdoor signs, substantial questions under both the United States and the New Jersey Constitutions are implicated. If the City of Gloucester City, a fully urban locale with use-compatible Industrial/Port & Cargo Zones, abutting a major interstate river artery utilized only for heavy commercial transportation and spanned by an interstate highway bridge, is permitted to enforce an overly broad sign speech ban predicated upon ephemeral and unsubstantiated notions of traffic safety and aesthetics, then all such speech in New Jersey, and elsewhere, is threatened by localized, ad hoc censorship and elimination. This outright ban severely limits the First Amendment expression of commercial and non-commercial speech, the promotion of regional commerce, property rights, and raises public policy and other substantial issues which must be resolved by this Honorable Court.

Judicial review should determine whether any municipality in New Jersey has the unilateral ability to select and eliminate broad categories of speech within its borders even when such messages are not visible to its inhabitants. The New Jersey State Legislature declared at N.J.S.A. 27:5-6 that regulation of Outdoor Signs must balance "safety and natural scenic beauty" with "promoting development and economic vitality and facilitating the flow of speech and expression of which providing messages of commercial, public and social value conveyed through the medium of roadside signs and outdoor advertising." Gloucester City's ban does not satisfy this test.

The Opinion of the Appellate Division of the Superior Court of New Jersey, and the New Jersey Supreme Court in reliance thereupon, ruled that indeed the relevant portions of the Zoning Ordinance *sub judice* were unconstitutional and that the Zoning Ordinance improperly derogated non-commercial speech, the most protected form of speech. However, neither lower Court went far enough since the Zoning Ordinance at issue is still impermissibly content-specific, subject to exacting scrutiny to determine if it both genuinely serves compelling governmental interests and is truly in the least restrictive means possible drawn.

Gloucester City's Master Plan/Zoning Ordinance includes Sub-Section XVI, "Permitted Signs", within the confines of the City. The instant sign Ordinance creates a total ban on all off-premises commercial and non-commercial signs, thereafter enumerating very limited exceptions to the ban. (See Part III of Appendix).

The Appellate Division, and the New Jersey Supreme Court in reliance thereupon, ruled Section 1604.12 of the Zoning Ordinance was clearly suspect because it categorizes and enumerates "acceptable" non-commercial speech and then the Courts ruled, unconstitutionally confines same to a limited time period. Erroneously, the lower Courts ruled that a simple severance of the offending temporal portion of that Ordinance cures the constitutional defect. However, severing the time limitations does not make the Ordinance any less content-specific and it remains constitutionally invalid: the municipality still selects only that non-commercial speech which formally "announces or advertises" a specific "political, educational, charitable, civic, professional, religious or like campaign or event". The protest sign which was permitted in *City of Ladue v. Gilleo*, 512 U.S. 43 (1944) ("Peace in the Gulf") would clearly not be permitted under this Ordinance. The Ordinance permits "announcing or advertising" an "event or campaign" but is limited to a specific and/or formal fundraiser or meeting; the non commercial message upheld in *Ladue*, *supra* was simply one person's informal, unsanctioned, commentary about the day's headlines.

In Gloucester City, however, the local politicians or even a town clerk arbitrarily act as self-appointed speech censors, choosing what is a specific "campaign or event"; what is "religious, civic, political, etc."; and what is an "announcement or advertisement." Such a regime cannot withstand the enacting scrutiny of this Honorable Court in the application of established precedents.

There is no allowance in Zoning Ordinance Section 1604.12 for outdoor signs of, for example, an unusual or private comment: a sign: "Happy Valentine's Day to my Wife of Fifty Years" is not permitted under the Ordinance since is not "political, educational, charitable, etc." A sign: "Gloucester City Town Fathers Always Raise Taxes Too Much" would not be permitted since it is not announcing a specific "campaign or event"; however, it does constitute an on-going informal commentary of general, personal dissatisfaction exactly like the message upheld in *Ladue*, *supra*. Although distasteful, would a sign: "Worship Satan" be permitted? Is it a "religion"? How is it an "event or campaign"? Although unusual, would a sign: "O.J. Simpson is Great!" be permitted; is it an event; is it political, educational, etc.? What goal does the City promote by affirmatively enumerating the speech it finds useful; why does it not simply permit *all* non-commercial speech? Allowing only speech which "announces or advertises" a specific "campaign or event" sets the City up as speech-content arbiter but not allowing all other speech is a fatal flaw.

"Today the central organizing concept of First Amendment doctrine is the distinction between content-based regulations and content-neutral ones. Content-based regulations will be almost never constitutional..." 44 *Hastings Law Journal*, 881 (1993). Content-specific Ordinances shall be closely scrutinized since the government selects the topics of public discourse and such regulation is strictly construed under both the United States Constitution and the New Jersey State Constitution. "For a content-based restriction in a traditional public forum to be valid, the restriction must pass muster under the strictest scrutiny: it must be necessary to serve a compelling

State interest...narrowly drawn to achieve that end". *Horizon Health Center v. Felicissimo*, 638 A. 2d. 1260 (N.J. Sup. Ct. 1994), quoting *Perry Education Association v. Perry Local Educator's Association*, 460 U.S. 37 (1983).

The Appellate Division's Opinion, and thus the New Jersey Supreme Court's reliance thereupon is not clear: it appears on the one hand to state that severing the time restrictions *only* from Ordinance Section 1604.12 is sufficient and on the other hand, the last full sentence appears to hold that the *entire* Ordinance Section 1604.12 should be severed (last full sentence of the Appellate Division's Opinion). If the Opinion is interpreted to delete Ordinance Section 1604.12 *entirely*, then all off-site non-commercial speech (permitted only via Section 1604.12) is totally excluded City-wide and the Ordinance must be held to be facially invalid as a total ban. The Zoning Ordinance must give non-commercial speech the same latitude and freedom as commercial speech and the City clearly cannot prefer commercial speech over non-commercial speech. *Metromedia*, supra.; *Rappa v. State of Delaware*, 18 F. 3d. 1043 (3rd Cir. 1994).

Conversely, if the Opinion is interpreted to delete the relevant temporal restrictions *only* and leave intact the remainder of Zoning Ordinance Section 1604.12, (thereby permitting the *enumerated* non-commercial speech but without time restrictions,) the Ordinance remains invalid since it still improperly enumerates "acceptable" non-commercial speech. Gloucester City selectively censors which speech it will permit and decides what is "political, religious, etc.," and further decides what is a specific "campaign or event" and what is an "announcement or advertisement".

This Court, using the strict scrutiny test, enunciated in *Ladue*, *supra*. should find that no compelling Gloucester City governmental interest is genuinely served by this total speech ban and that the instant Zoning Ordinance is not narrowly drawn. Excluding personal speech but permitting arbitrarily defined speech is illogical and does not serve any compelling interest. Further, excluding constitutionality-protected speech

in the City's Industrial/Port & Cargo Zones, with huge ships, cranes and marine warehouses, hardly serves the proffered interests of traffic safety, property values or aesthetics, particularly when such speech is only visible to bridge traffic on an interstate highway.

As this Court recently found in *44 Liquormart, Inc. v. Rhode Island*, ___ U.S. ___, 116 S. Ct. 1495 (1996) the regulating body bears the burden of showing not merely that its regulation will advance its interest, but also that it will do so to a *material degree*. Likewise, there is no justification for such broad sign speech limitations everywhere in Gloucester City, particularly the proposed fully industrialized location and especially when the signs are not visible to Gloucester's residents. And as noted above, the Gloucester City Planning Board concedes that it never even considered a less restrictive means to target its goals.

Further illustrating the lower New Jersey Court's misapplication of the law to the Ordinance, they ignore the companion Gloucester City Zoning Ordinance Section 1604.1 which permits *all* "signs erected by governmental agencies". Such a broad exception favoring government signs was considered improper under *Rappa*, supra; the Third Circuit found the government had no greater ability to post all of its signs than would a private user and that it did not have a monopoly on censorship of signs such that every governmental sign would be permitted regardless of content or need. However, severing Section 1604.1 would not render the instant Zoning Ordinance constitutional since doing so would effectively *prohibit* all government signs; only amendment will work.

The Gloucester City Zoning Ordinance at companion Section 1604.6 also improperly favors one form commercial speech over another by permitting signs for construction work being done on a premises. That Ordinance favors construction work but does not permit, for example, an architect, accountant or roofer to place a sign at the location where he/she is doing a great deal of work. There is scant logic in permitting such broad commercial speech in residential areas for home

contractors when all other such residential or other Zone speech/advertising is banned in terms of aesthetics, etc. This Ordinance speech exception is similar to the issue raised in *City of Cincinnati v. Discovery Network* 502 U.S. 410 (1993), in which this Court held that a partial ban on commercial speech did not genuinely serve aesthetics or safety. Zoning Ordinance Section 1604.6 clearly favors commercial speech over non-commercial speech and certain types of commercial speech over other types, also contrary to *Metromedia*, supra. Severing Section 1604.6 would not render the Ordinance constitutional; only amendment will work.

With respect to the lower Court's proposed "solution" of severance, the validity of a Zoning Ordinance from which a provision has been severed is contingent upon whether the remaining portion is functionally self-sufficient and still contains the essentials of a complete enactment. *Gardens v. City of Passaic*, 327 A.2d 250 (N.J. Super. Ct., L. Div. 1974); *N.J. Chapt.; Am I.P. v. N.J. State Bd. of Prof. Planners*, 227 A. 2d 313 (N.J. Sup. Ct. 1962).

But as the Third Circuit stated in *Rappa*, *supra*, at 1072: "eliminating the offending exception (to a speech ban) would mean that we would be requiring the State to restrict *more* speech than it currently does...To our knowledge, no Court has mandated issuance of an injunction such as that, and we decline to be first." And as this Court stated in *Ladue*, *supra* at ___, 114 S. Ct. 2038 at 2043: "...the City might theoretically remove the defects in the Ordinance by simply repealing all the exemptions. If, however, the Ordinance is also vulnerable because it prohibits too much speech, that solution would not save it." Assuming arguendo the Gloucester City Zoning Ordinance may permissibly enumerate non-commercial speech, the City can do so only by formal amendment and not by severance; however, Intervine's rights are vested and remand to permit amendment should not be allowed at this late date.

Only the intervention of this Honorable Court can redress the wrongs done below and bring the Gloucester City, New

Jersey Ordinance into conformity with the settled law of the land as embodied in *Metromedia, supra.* and its progeny.

CONCLUSION/RELIEF REQUESTED

Petitioner seeks a determination that the Gloucester City Ordinance, as interpreted by the Lower Courts, is unconstitutional and that this case be remanded for entry of an appropriate Order providing for the variance sought by Petitioner in its original Application. If the Gloucester City Zoning Ordinance under which Intervine made its variance Application is held unconstitutionally void, Intervine is entitled to the relief requested therein and the status of the Gloucester City Master Plan/Zoning Ordinance *at the time of the Application* is controlling. If the City now adopts a new Zoning Ordinance restricting the use or bulk requirements necessary to permit the proposed use, then those requirements will simply constitute a non-conforming but vested, permitted use such as provided in N.J.S.A. 40:55D-68.

In *Bell*, supra, the New Jersey Supreme Court invalidated a similar Zoning Ordinance and noted that Stafford Township was not prevented from enacting an Ordinance satisfying the constitutional imperatives; however, the Court did not stay its decision pending reenactment of such an Ordinance; *see also STC Corp. v. Planning Board of Hillsborough*, 476 A. 2d 888 (N.J. Super. Ct., App. Div. 1984) in support.

There is no legal or equitable requirement that this Court make available to Gloucester City an additional opportunity to revise or reexamine its Zoning Ordinance to cure the invalidity. Here, Intervine first applied for use and other variances and has exhausted all of its administrative remedies before the Zoning Board of Adjustment and only then appealed. The situation is unlike and distinguishable from those in either *Exxon Co., U.S.A. v. Livingston Township in Essex County*, 489 A. 2d 1218 (N.J. Super. Ct., App. Div. 1985), or the *Deal Gardens, Inc. v. Board of Trustees of Lock Arbor*, 226 A. 2d 607 (N.J. Sup. Ct. 1967) case upon which it relies in which those Courts permitted amendment.

Vesting will avoid what Justice Brennan, in *San Diego Gas & Electric v. San Diego*, 450 U.S. 621 (1987), said was advice given to the City attorney about how to respond (and frustrate an Applicant) when a land use regulation is stricken by a Court: "if all else fails, merely amend the regulation and start over again."

Respectfully submitted,

KATZ, ETTIN, LEVINE, KURZWEIL
& WEBER, P.C.
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DATED: Oct. 4, 1996

APPENDIX

SUPREME COURT OF NEW JERSEY
C-1232 September Term 1995
42,339

INTERVINE OUTDOOR ADVERTISING, INC.,

Plaintiff-Petitioner,

v.

CITY OF GLOUCESTER CITY ZONING BOARD OF ADJUSTMENT, CITY OF GLOUCESTER CITY,

Defendants-Respondents.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-5193-94 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs; and it is further

ORDERED that the appeal filed in the within matter is dismissed pursuant to *Rule* 2:12-9.

WITNESS, the Honorable Alan B. Handler, Presiding Justice, at Trenton, this 10th day of July, 1996.

/s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-5193-94T3

INTERVINE OUTDOOR ADVERTISING, INC.,

Plaintiff-Appellant,

v.

CITY OF GLOUCESTER CITY ZONING BOARD OF ADJUSTMENT and CITY OF GLOUCESTER CITY,

Defendants-Respondents.

Argued March 26, 1996 - Decided May 02 1996

Before Judges Michels, Villanueva, and Kimmelman.

On appeal from the Superior Court of New Jersey, Law Division, Camden County.

Martin S. Ettin argued the cause for appellant (Katz, Ettin, Levine, Kurzweil & Weber, attorneys; Andrew S. Genetta and Mr. Ettin, on the brief).

Barry J. Beran argued the cause for respondent City of Gloucester City Zoning Board of Adjustment (Beran & Beran, attorneys; Gail R. Beran and Mr. Beran, on the brief).

M. James Maley, Jr. argued the cause for respondent City of Gloucester City (Maley, Williamson, Hayden & Gmerek, attorneys; Mr. Maley and Charles W. Wigginton, on the brief).

The opinion of the court was delivered by

KIMMELMAN, J.A.D (temporarily assigned).

Plaintiff Intervine Outdoor Advertising, Inc. appeals from a judgment of the Law Division which affirmed the denial by defendant City of Gloucester City Zoning Board of Adjustment (Board) of plaintiff's application for a use and bulk variance to construct three freestanding billboards on property it intends to lease adjacent to the New Jersey approach to the Walt Whitman Bridge. Plaintiff's complaint in lieu of prerogative writs also joined as a defendant the City of Gloucester City (City), contending that the zoning ordinance was invalid because the City had not reexamined its master plan and zoning regulations within six years as required by *N.J.S.A.* 40:55D-89, and that, if not invalid, the zoning ordinance was otherwise unconstitutional. The Law Division rejected these claims, upholding the validity of the zoning ordinance.

We affirm the denial of plaintiff's application for a use and bulk variance and affirm that portion of the judgment entered April 14, 1995, which upheld the City's compliance with *N.J.S.A.* 40:55D-89 and which also upheld the constitutionality of the zoning ordinance insofar as it regulates commercial speech with respect to the sign regulations. The trial court did not reach the question as to the constitutionality of the sign regulations applicable to noncommercial speech. However, we find unconstitutional that part of the sign regulations which limits noncommercial speech contained in signs to a temporary basis not to exceed a consecutive period of sixty days in any calendar year. Since we do not find the constitutional defect to require invalidation of the entirety of the sign regulations contained in the zoning ordinance, but only to require severance of the offending language from the noncommercial sign regulations, the remaining provisions survive.

Plaintiff is a company engaged in erecting and maintaining freestanding, outdoor advertising structures. It has entered into an arrangement with Holt Cargo Systems, Inc., the owner of the subject property, to lease the property for the erection of billboards. The property site is located in the Port and Cargo Handling Zone of the City's zoning ordinance, wherein the permitted uses pertain to the maintenance of piers, warehouses, and like facilities for the operation of businesses related to the receipt, temporary storage, and transfer of cargo. A use not specifically permitted in that particular zone, such as the erection and maintenance of signs, is prohibited under the ordinance. The site is also located in the Shoreline Overlay District, which includes lands within 500 feet of the Delaware River shorelines. Among the stated purposes for creating this district are the encouragement of public use and enjoyment of the shorelines and the enhancement and increase of views and access to the water. An objective of the City's 1985 master plan is eventually to rezone the waterfront area from industrial to mixed-use development and to clean up and beautify the entrances to the City by various techniques, which include prohibiting new billboards and attempting to retire old ones.

Plaintiff proposes to construct three double-faced, steel, freestanding pole signs, one on the south side of the Walt Whitman Bridge and two on the north side. Each sign would be externally lit at the bottom, measuring 16 feet by 60 feet, and would be located approximately 30 feet above the bridge roadway, approximately 90 feet above the ground, and approximately 30 feet from the bridge rights-of-way. In addition to commercial advertisements, plaintiff proposes to use the reverse side of the signs for noncommercial advertisements and messages such as promoting the New Jersey State Aquarium, the New Jersey State Tax Amnesty Program, the Franklin Institute, and political campaigns. Similar noncommercial billboards are located adjacent to the bridge on the Pennsylvania side.

After considering the application and the testimony presented in support and against thereof, the Board concluded

that plaintiff's application was a substantial departure from the signage requirements of the zoning ordinance, that the application could not be granted without substantial detriment to the public health, safety, and welfare of the City, and that plaintiff had not shown any special reasons why the application should be granted in view of the detriments. *See N.J.S.A.* 40:55D-70d.

We are satisfied, based upon the thorough and well-reasoned letter opinion of Judge Theodore Z. Davis, that the Board's denial of plaintiff's application for a use and bulk variance finds support in the evidence and was not arbitrary, capricious, or unreasonable. *Booth v. Board of Adj. of Rockaway,* 50 *N.J.* 302, 306 (1967). Judge Davis also correctly held that the City had complied with *N.J.S.A.* 40:55D-89, which provides in pertinent part:

> The governing body shall, at least every six years, provide for a general reexamination of its master plan and development regulations by the planning board, which shall prepare and adopt by resolution a report on the findings of such reexamination, a copy of which report and resolution shall be sent to the county planning board and the municipal clerk of each adjoining municipality. . . .

On April 15, 1991, within the six-year statutory period, the City adopted resolution #67, which reads:

> WHEREAS, the Planning Board of the City of Gloucester City has conducted a review and re-examination of the existing Master Plan for the City of Gloucester City;
>
> WHEREAS, the Planning Board of the City of Gloucester City has recommended that the Mayor and Council of the City approve and adopt the existing Master Plan for the City;
>
> WHEREAS, the Mayor and Council is satisfied that the Planning Board has conducted a general re-examination of the City's Master Plan and

> Development Regulations and has reported to Mayor and Council its recommendation that the existing Master Plan be readopted;
>
> NOW, THEREFORE, BE IT RESOLVED, by Mayor and Council of the City of Gloucester City that the existing Master Plan is hereby readopted in accordance with N.J.S.A. 40:55D-89 and that the Master Plan shall continue in full force and effect unless otherwise provided by law.

Although proof was not submitted that the planning board had prepared a formal report and that a copy of the report had been submitted to the county planning board, sufficient evidence was submitted to the trial court showing that the master plan and zoning ordinance had been reviewed and examined continually by the planning board over the years in question. Such proof raised a debatable question as to the reexamination of the master plan and zoning regulations and, therefore, was sufficient to overcome the statutory rebuttable presumption of unreasonableness required by *N.J.S.A.* 40:55D-89.1. The rebuttable presumption of unreasonableness having been overcome, the presumption of validity inherent in the municipal enactment then reattaches, as found by Judge Davis. *See Lionshead Woods Corp. v. Kaplan Bros.*, 243 *N.J. Super.* 678, 684-85 (Law Div. 1990).

With respect to the constitutionality of the sign regulations, we agree with Judge Davis's reasoning and conclusion that the sign regulations applicable to commercial speech were not constitutionally infirm. Judge Davis held a so-called "Bell hearing" pursuant to *Bell v. Stafford Township*, 110 *N.J.* 384, 396-97 (1988), and determined that there were compelling governmental interests that *supported the regulations applicable to commercial signs*. Judge Davis did not reach the question as to whether the City's sign regulations applicable to noncommercial speech pass constitutional muster. However, we find the sign regulations applicable to noncommercial speech to be unconstitutional.

The City's zoning ordinance, Section 1604, subsection 12, applicable to noncommercial signs other than governmental, directional, and traffic control signs and devices, permits:

> Temporary signs announcing or advertising any political, educational, charitable, civic, professional, religious, or like campaign or event for a consecutive period not to exceed sixty (60) days in any calendar year, providing they do not exceed fifty (50) square feet in size.
>
> [Gloucester City, N.J., Ordinance 81 (April 2, 1987).]

Thus, noncommercial signs and billboards conveying a political message or, for example, promoting the New Jersey Tax Amnesty program or urging visits to the New Jersey State Aquarium must be temporary in nature, not to exceed sixty days in any calendar year. The zoning ordinance imposes no time limitation, however, upon commercial signs. In effect, the zoning ordinance does not give noncommercial speech the same latitude or freedom as afforded to commercial speech. While we have no quarrel with defendants' overall desire to restrict the erection of billboards because of their generalized concern for safety and aesthetic purposes, *see Bell v. Stafford Tp.*, *supra*, 110 *N.J.* at 393 (1988); *State v. Miller*, 83 *N.J.* 402, 409 (1980); *United Advertising Corp. v. Borough of Metuchen*, 42 *N.J.* 1, 5-6 (1964), we must question the limitation on the right of free speech implicit in the requirement that noncommercial signs be temporary in nature.

In weighing the constitutionality of the zoning ordinance as applied to noncommercial signs, a court must focus upon whether the temporal restrictions imposed by the municipality upon noncommercial signs are content-neutral or content-based. *Rappa v. New Castle County*, 18 *F.*3d 1043, 1053 (3d Cir. 1994).

If the restriction is content-based, then the regulation is subjected to the most exacting scrutiny, and the municipality is required to show that the regulation is necessary to serve a

compelling municipal interest and that it is narrowly drawn to achieve that end. *Boos v. Barry*, 485 *U.S.* 312, 321, 108 *S. Ct.* 1157, 1164, 99 *L. Ed.* 2d 333, 344-45 (1988); *Whitton v. City of Gladstone, MO.*, 54 *F.*3d 1400, 1408 (8th Cir. 1995); *Horizon Health Ctr. v. Felicissimo*, 135 *N.J.* 126, 140 (1994). If the restriction is content-neutral, then it is analyzed under a time, place and manner standard to determine whether it serves a significant governmental interest and leaves open ample alternative channels for communication of the information. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 *U.S.* 748, 771, 96 *S. Ct.* 1817, 1830, 48 *L. Ed.* 2d 346, 363-64 (1976); *Whitton, supra*, 54 *F.* 3d at 1403; *Rappa, supra*, 18 *F.* 3d at 1054; *McCormack v. Township of Clinton*, 872 *F. Supp.* 1320, 1323 (D.N.J. 1994); *State v. Miller; supra*, 83 *N.J.* at 412.

Here, the temporal restrictions placed upon noncommercial speech clearly impose a content-based regulation on subsection 12 of Section 1604 of the zoning ordinance. It is the wording or message sought to be conveyed by a given sign that dictates the durational life of the sign. Hence, the regulation in question is clearly content-based. *Metromedia, Inc. v. City of San Diego*, 453 *U.S.* 490, 516, 101 *S. Ct.* 2882, 2897, 69 *L. Ed.* 2d 800, 820 (1981); *Whitton, supra*, 54 *F.* 3d 1403-04; *Rappa, supra*; *National Advertising Co. v. Town of Babylon*, 703 *F. Supp.* 228, 238-39 (E.D.N.Y. 1989), *aff'd in part, rev'd in part*, 900 *F.*2d 551 (2d Cir. 1990), *cert. denied*, 498 *U.S.* 852, 111 *S. Ct.* 146, 112 *L. Ed.* 2d 112 (1990).

We fail to discern the compelling governmental interest sought to be protected by the blanket restriction making temporary all forms of noncommercial signs. In our view, the relegation of all noncommercial signs to a temporary life creates an impermissible distinction between commercial and noncommercial speech. *Metromedia, Inc., supra.*

As said in *National Advertising Co., supra*,

> [I]n order to pass constitutional muster, a sign ordinance, to the extent that it regulates non-commercial speech, may neither regulate such speech more

> stringently than it does commercial speech nor demonstrate a preference for the subject matter of certain non-commercial speech over other non-commercial speech.
>
> [703 *F. Supp.* at 237.]

Accordingly, the temporal restrictions contained in subsection 12 of section 1604 of the sign provisions of the zoning ordinance are unconstitutional *U.S. Const.* amend. I; *N.J. Const.* art. 1, ¶ 6; *Metromedia, Inc.*, *supra*; *Whitton*, *supra*; *Rappa*, *supra*; *National Advertising Co.*, *supra*.

We make no ruling with respect to the square-footage limitation imposed on noncommercial signs. That issue has not been raised or argued. However, we do note a pertinent statement in *State v. Miller*, *supra*:

> Limitations on the size of a sign may be imposed if the allowable square footage is not determined in an arbitrary manner. The size limits, if any, must be large enough to permit viewing from the road, both by persons in vehicles and on foot. Inadequate sign dimensions may strongly impair the free flow of protected speech.
>
> [83 *N.J.* at 416.]

The United States District Court in *National Advertising Company*, *supra*, rather than striking the entirety of the municipal ordinance found to make an unconstitutional distinction between commercial and noncommercial speech, narrowly tailored its constitutionally-based injunctive relief, holding only that the municipality may not enforce that portion of the ordinance that disadvantaged noncommercial speech. 703 *F. Supp.* at 240. On appeal, the Second Circuit reversed the District Court only with respect to the limitation of the constitutional ban to that portion of the ordinance that disfavored noncommercial speech. There was no severability clause in the ordinance that would justify saving the remaining portions, and hence, the entire ordinance was struck down. 900 *F.*2d at 557.

Fortunately for defendants, the ordinance in question before the court does have a severance clause which provides:

> Should any section or provision of this Ordinance for any reason be declared invalid by the Courts, such decision shall not effect [sic] the validity of this Ordinance as a whole or any other part thereof.

The presence of such a clause raises, at the minimum, a rebuttable presumption of severability. *Helmsley v. Borough of Fort Lee*, 78 *N.J.* 200, 237 (1978), *appeal dismissed*, 440 *U.S.* 978, 99 *S. Ct.* 1782, 60 *L. Ed.* 2d 237 (1979), *clarified*, 82 *N.J.* 128 (1980). We believe the commercial sign provisions of the ordinance can stand in the absence of the time restrictions contained in the noncommercial sign provision. In effect, the absence of the temporal restrictions contained in subsection 12 of Section 1604 will not preclude noncommercial signs and will not truncate the entirety of the sign provisions into incomprehensibility. We shall observe the severance clause.

For the reasons set forth, we affirm the judgment of April 14, 1995, entered by Judge Davis, but find subsection 12 of Section 1604 of the City's zoning ordinance to be unconstitutional and, therefore, unenforceable.

ARTICLE XVI

SIGNS

SECTION 1601. PURPOSE. The purpose for this Article shall be the creation of a system of regulations for the review, erection and maintenance of signs within the City of Gloucester City.

SECTION 1602. DEFINITIONS. For the purpose of this Article the following definitions shall apply:

1. Banner sign. A temporary sign composed of lightweight material either enclosed or not enclosed in a rigid form secured or mounted so as to allow movement of the sign caused by movement in the atmosphere.

2. Building facade and building facade area. That portion of any exterior elevation of a building extended from grade to the top of the parapet wall or eaves and the entire width of the building elevation.

3. Changeable copy sign. A sign on which any manual, mechanical, or lightning effects can have its copy or message changed from any reworking of the sign.

4. Free standing sign. A pole, ground, or pylon sign not attached to a building or structure.

5. Functional sign. A directional sign; a sign indicating the location of rest rooms, telephones, first aid stations, and similar public convenience facilities; and signs located on mechanical dispensing equipment that identifies a product.

6. Marquee or canopy sign. Any sign attached to a fixed shelter or roof extending over a building line which is supported by the building to which it is attached.

7. Mobile sign. A sign not permanently attached to the ground or a building including any sign mounted on or attached to a vehicle which is not capable of

self-propulsion and registered with the New Jersey Division of Motor Vehicles.

8. Parapet. The portion of a building wall that rises above the roof level.

9. Pole or pylon sign. A sign mounted on, or supported by or suspended from a free-standing column, pipe or pole.

10. Projected sign. A sign casted, reflected or shown on a wall screen, or other surface whether for a continuous period or not.

11. Roof sign. A sign erected upon, against, or directly above a roof or on top of or above the parapet of a building.

12. Sign. A name, identification, description, illustration, or any other visual display which is affixed to, painted on, or represented directly or indirectly, upon any building, structure or land and which directs attention to an organization, business, product, service or individual.

13. Sign area. The entire space within a sign's continuous perimeter enclosing the extreme limits of all words, devices, or emblems but not passing through or between any adjacent elements. In computing the area of a sign with two (2) display surfaces, the area of the larger surface shall be considered the sign area. The area shall be computed by adding the total surface area of the sign and dividing by the number of display surfaces utilized by the sign. The display surface of a sign shall mean all side and faces of a sign that can be viewed from one (1) location.

14. Under canopy signs. A sign attached to the underside of a canopy.

15. Wall sign or facade sign. A sign attached to or erected against the wall of a building with the face in a parallel plane to the place of the building wall.

SECTION 1603. GENERAL REGULATIONS. The following regulation shall govern signs for all uses within the City:

1. All signs shall be subject to the provisions of the building, construction, maintenance, and fire codes of the City.

2. The text of all signs shall be limited to identification and functional purposes only. Identification signs shall contain the principal name of the establishment, firm or proprietor, its address, and a brief description of the goods or services offered. The text of a sign may also include a logogram or symbol of the use which it identifies.

3. The provisions of this Article shall not apply to works of art, statues, sculpture, fountains, holiday decorations and similar objects which do not fall within the definition of a sign contained in Section 1402 of this Article.

4. Maintenance. The area surrounding a sign shall be kept clean, free of litter, and landscaped. Whenever a sign shall become structurally unsound or a hazard to the public or a building, the building inspector shall order that the sign be made safe or removed. Such order shall be complied with within ten (10) days of the receipt therof by the person owning or using the

5. No sign except functional signs, shall be located within twenty (20) feet of the existing or proposed right-of-way of any public road or street.

6. No sign shall exceed twenty (20) feet in height.

7. No wall sign shall extend beyond the building facade on which it is mounted.

8. All signs shall conform to the provisions of Title 27 of the New Jersey State Statues.

9. No sign shall be erected or placed in a position which will cause danger to traffic on a street or within a parking lot by limiting the vision of drivers or obstructing the flow of traffic.

10. Signs advertising or identifying a business or use no longer in existence or a product no longer available shall be promptly removed.

11. No sign shall be erected containing information on it which states or implies that a property may be used for any purpose not permitted under the provisions of the City's Zoning Ordinance as it applies to the property on which the sign is located.

12. No sign shall be illuminated between the hours of 10 p.m. and 7 a.m. the following morning, unless the business or use so advertised is open to the public later than 10 p.m. in which case the establishment may keep its sign illuminated until the business closes, but not after.

SECTION 1604. PERMITTED SIGNS. the following signs shall be permitted within the City of Gloucester in accordance with the provisions of this Article:

1. Signs erected by governmental agencies; court or public notices; traffic control devices approved or installed by the appropriate governmental agencies; and flags, emblems, and insignias of governmental and religious institutions.

2. One (1) non-illuminated or white light sign not exceeding nine (9) inches by eighteen (18) inches and either free standing or affixed to a building which:

   a. Contains a message of caution, pertains to tresspassing, identifies a driveway or bears a relatd cautionary text.

b. Identifies the name and occupation of the practitioner of a profession or trade.

3. One (1) non-illuminated or white-lighted non-flashing sign for schools, churches, hospitals, clubs, lodges, or other similar use provided that the size of any one (1) side of the sign shall not exceed twelve (12) feet. When a building or lot fronts on more than one (1) street, an additional sign may be erected which meets the requirements of this paragraph.

4. One (1) non-illuminated real estate sign advertising the sale or rental of a building or lot provided such sign does not exceed twelve (12) square feet. When a building or lot fronts on more than one (1) street, an additional sign may be erected which meets the requirements of this paragraph.

5. One (1) non-illuminated real estate sign bearing the word "SOLD" or "RENTED" with the name of the person or firm affecting the sale or rental, provided such sign does not exceed twelve (12) square feet.

6. One (1) non-illuminated sign bearing the name and profession or trade for each person or firm performing construction or repair work on the premises, provided such individual signs do not exceed twelve (12) square feet in area, and are promptly removed upon completion of the work.

7. For business, office, commercial/industrial, and institutional uses: functional signs as defined in Section 1601, provided that no functional sign shall exceed twelve (12) square feet in sign area and that no functional sign shall contain advertising.

8. For business, office, commercial and institutional and building which faces an approved public street provided that the sign area does not exceed five (5) percent of the building facade area as defined in Section 1602 on which it is mounted.

9. For business, office, commercial and industrial uses: One (1) free-standing sign provided that the sign area does not exceed ten (10) percent of the builing facade area as defined in Section 1602, which it adjoins, or a maximum sign area of one hundred (100) square feet. No shopping center, office complex, or other business or industrial development or property shall have more than one (1) free-standing sign.

10. For shopping centers or strip stores: One (1) under-canopy sign for each business use provided that the dimensions of the sign shall not exceed non (1) foot in weight or four (4) feet in length.

11. For movie theaters, theaters, and sports areas: those signs permitted by paragraphs 8 and 9 above, plus one (1) changeable copy sign with a maximum sign area of one hundred (100) square feet.

12. Temporary signs announcing or advertising any political, educational, charitable, civic, professional, religious, or like campaign or event for a consecutive period not to exceed sixty (60) days in any calendar year, providing they do not exceed fifty (50) square feet in size.

13. Signs identifying a residential area or apartment complex provided that not more than one (1) sign shall be located at each principal entrance to the project, not more than three (3) signs permitted for any one (1) project and that the sign contain only the name of the development and a logogram or symbol and that its size not exceed forty (40) square feet in size area.

SECTION 1605. PROHIBITED SIGNS. Although it should be understood that any sign not complying with the provisions of this Article is prohibited, the following types of signs are specifically prohibited.:

1. Flashing, moving, or apparent moving signs except the changeable copy signs permitted by Section 1604. and time and temperature signs.

2. Signs with any lighting or control mechanism which may cause radio or television interference.

3. Any series of two (2) or more signs or sign units placed in a line along a roadway or in similar fashion all carrying a single message part of which is contained or each sign.

4. No signs shall be erected, located, affixed or painted on trees, rocks, curbs, walks, or utility poles. (Amended October 3, 1991)